IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO.34 OF 2005

Mrs. Mandy Jane Collins
Major,
Permanent r/o 2 Rocky Road,
Caherciveen, County Kerry,
Ireland, presently residing
at Friends Guest House,
Anjuna, Bardez, Goa. .... Petitioner

– Versus -

1. Mr. James Michael Collins,
r/o 1784, Mazalvaddo,
Anjuna, Bardez, Goa.

2. The Police Inspector,
Anjuna Police Station,
Anjuna, Bardez, Goa. .... Respondents

Shri Anil Malhotra for the Petitioner.

Sarvasri M.S. Usgaonkar, Sr. Advocate, with S.G. Bhobe
for the Respondent No.1.

Shri S.N. Sardessai, Public Prosecutor, for the
Respondent No.2.

CORAM: R.M.S. KHANDEPARKAR &
N. A. BRITTO, JJ.

DATED: 3rd MARCH, 2006

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard. By the present petition, the petitioner is seeking

issuance of writ in the nature of habeas corpus for production, release and return of her minor daughter by name Ella Karina Collins from the respondent No.1, in order to enable the petitioner to take her to Ireland.

2. It is the case of the petitioner that the petitioner is a permanent resident of Ireland and a British citizen holding a permanent passport of the United Kingdom. She arrived in India on 18-9-2005 specifically to seek the custody, care and control of her minor daughter Ella, who is aged about 8 years and who is presently at House No.1784, Mazalvaddo, Anjuna, Bardez, Goa, with her father. The petitioner was married to the respondent No.1 on 6-6-1998 and Ella was born on 5-7-1997 in England and she is also a British national. The respondent No.1 is from the United States of America. It is her further case that Ella started her preliminary education at Coars National School in Ireland. The petitioner is employed as an English teacher and is a permanent resident of Ireland. The respondent No.1 owned a house in Washington State where he used to reside and had his business in Seattle, U.S.A. However, as of now he is not pursuing any business activity and presently is living in Goa in the said house referred to above. It is her further case that consequent to the marriage they stayed for different period of times

in the U.S.A. and the U.K., besides spending some time in India and other countries for holidays. However, due to irreconcilable differences, they parted company of each other in November, 2000, but have not yet obtained any divorce decree to dissolve their marriage. After Ella attended her school in Ireland in June, 2004, there were vacations in the months of July and August and during those holidays, the respondent No.1 took Ella to Switzerland and from there to India in September, 2004. Initially, the respondent No.1 took Ella to a Dharmashala in Himachal Pradesh and then in November, 2004 the respondent No.1 brought Ella to Goa. Towards the end of November, 2004 he got Ella admitted to Mater Dei Educational Institution at Saligao, Goa, in IInd standard and after the break in April-June, 2005, Ella was detained in the same standard. It is her grievance that inspite of persistent efforts on her part, the respondent No.1 refused to return Ella to Ireland. The petitioner has been aiming and working to see all along that Ella should continue her education in Ireland. Presently, the child has lost considerable weight and does not enjoy some of the medical facilities which would be available to her in Ireland. She does not have the emotional and mental support of her mother which is necessary for upbringing an eight year old child. Besides that, Ella is not in her natural surrounding. All the efforts to negotiate with the respondent No.1,

even with the intervention of strangers and friends, have failed. It is her case that the climate, environment, surrounding, family support, mother's love, affection, schooling and all the other necessary ingredients are available only in Ireland and the respondent No.1 has U.S. Passport of Ella on which he brought her to India and which is also in his custody. The petitioner is the best person to look after and maintain the child of 8 years in Ireland and the welfare of the minor being of paramount consideration, the child's custody should be given to the petitioner. The petitioner is also a well-qualified teacher and leads a stable life in Ireland. The respondent No.1 is over 62 years of age and living alone and cannot provide the necessary care for an 8 year old girl. In the interest of justice, therefore, the custody of the minor girl should be ordered to be given to the petitioner, along with her passport which is in the custody of the respondent No.1.

3. On the other hand, while raising preliminary issue regarding the non-maintainability of the writ petition in the nature of habeas corpus for seeking the custody of the minor child on account of alternative and efficacious remedy for such relief being available in the Civil Court in Goa, it is the case of the respondent No.1 that the petitioner has suppressed material facts while approaching the

Court and on that count also the petition deserves to be dismissed. It is his further case that the petitioner and the respondent No.1 came for the first time in Goa after their marriage in the month of December, 1996 and stayed at Anjuna till March, 1997. The petitioner and the respondent were staying, after their marriage, in the U.S.A. and the petitioner even became eligible for a Green-card as a permanent American resident status, in or about November, 1999. The petitioner and the respondent together returned to India in October, 2000 and toured various places in North India and thereafter along with the child came to Goa in November, 2000, when the petitioner decided to separate from the respondent and informed the said fact to the petitioner on or about 11-11-2000 while they were in New Delhi. Consequently, the petitioner and the respondent commenced residing separately at Anjuna from November, 2000 onwards till March, 2001. At the same time, Ella also used to stay occasionally with her mother. The petitioner was staying in a single room while the respondent No.1 has hired a house for residence. Their child Ella was staying on a week-to-week basis at both the places. Ella proceeded along with the petitioner in March, 2001 to the U.K. while the respondent proceeded to the U.S.A.. In or about June, 2001, the petitioner came to the United States with Ella and contacted the respondent with whom Ella was residing till

September, 2001, when the petitioner took her back to the United Kingdom, with the consent of the respondent, while the petitioner completed a degree in the English language teaching at Seattle University. In terms of the agreement between the parties, both came to Goa in November, 2001 since by that time the respondent desired to make Goa as a permanent home. The petitioner and the respondent shared the company of their minor child from November, 2001 till May, 2002 and during the said period the child was residing with the respondent and even undertook long holidays to Himachal Pradesh and the other parts of North India. Some time in June, 2002, with the consent of the respondent, the petitioner took Ella to the United Kingdom and visited Ireland till August, 2002 on condition that Ella would return to Goa in September, 2002. At that time, the petitioner was seen residing in the company of one person by name Dave. In September, 2002 the petitioner informed her inability to come to Goa and again in October, 2002 informed that she would come to Goa in November, 2002, when she actually came to Goa. Ella then began to reside with the respondent No.1. The petitioner used to visit Ella on and off while residing in a room at Anjuna. During the said period, a common friend by name Barbara attempted to mediate about the custody of Ella between the petitioner and the respondent and it was agreed that the child should commence school

in Goa from November, 2002 since she would have by then completed 6 years of age and accordingly Ella commenced her education at Rainbow CLCC Co-operative Centre for Children at Anjuna since November, 2002. The petitioner, as agreed, took Ella to Ireland in March, 2003 and the respondent No.1 collected his child Ella from the petitioner in July, 2003 and after visiting the child's maternal grandparents, uncle, aunt and cousins in the United Kingdom and after a stay of two months in the United Kingdom, at the house of the respondent's elder daughter, returned to India in September, 2003. In or about November, 2003, the petitioner returned to Goa and commenced staying at Palolem Beach, Canacona, Salcete-Goa, at a distance of over 80 kms. from the respondent's residence. She stayed there upto March, 2004 and occasionally used to visit Ella as well as used to take Ella out to Palolem Beach to spend some time with her. In March, 2004 the parties agreed that the petitioner shall take Ella with her for holiday to the United Kingdom and Ireland since Ella had holidays from school. Ella stayed with the petitioner till August, 2004 when the respondent No.1 collected Ella from the United Kingdom and after visiting relations in the United Kingdom returned to Goa in October, 2004 along with Ella who was then by 7 years of age. She was then admitted to Mater Dei Education Institution at Saligao in November, 2004. This fact was informed in

advance to the petitioner. The said school is an ICSE school (Delhi Board) with very high standard of education and founded since 1909. It is a reputed school in North Goa. Since October, 2004 the child Ella has been permanently residing at the respondent's residence in House No.1784, Mazalvaddo, Anjuna, Bardez, Goa and had never been in the custody of the petitioner throughout this period. The petitioner came back to India in late November, 2004 and stayed in Palolem upto March, 2005. The petitioner left Goa for the United Kingdom some time in March, 2005 and again returned to Goa on 18-9-2005 along with her friend Stuart. The petitioner had been visiting the child at the respondent's residence and even taking her out for meals or to stay at her room at Anjuna. Even after filing of the petition, she had been visiting the child in the residence of the respondent, without difficulty. There had been exchanges of messages in October, 2005 which would reveal the above facts. The child is growing in a most conducive atmosphere. She attends her regular routine of going to school by school bus, returns home at lunch hours and after completing her homework, she regularly plays and spends time with the respondent as well as the friends of her age in the locality of the respondent's house. The reply filed by the respondent refers to details of the arrangement made by the respondent for the welfare of the child and for her upbringing.

4. Before we deal with the rival contentions which are sought to be raised in the matter, it is necessary to consider the preliminary issue which is sought to be raised in the matter regarding non-maintainability of habeas corpus writ petition to claim the custody of the child in view of availability of alternative efficacious remedy for that purpose. Various decisions are sought to be relied upon in that regard by the learned Advocates appearing for the parties.

5. In **Surinder Kaur v. Harbax Singh Sandhu and another,** reported in 1984 HLR 780, the Apex Court was dealing with a case wherein the wife, while she was away on account of being employed and without her knowledge, the husband took away the boy from England and brought him to India on 31-1-1983 and on the same day the wife obtained an order under Section 41 of the Supreme Court Act, 1981 under which the boy became the Ward of the Court with effect from that day. That order was confirmed on 22-7-1983 by Mrs. Justice Booth of the High Court of Justice (Family Division) and by the said order the husband was directed to handover the custody of the minor boy to the wife or her agent forthwith. The wife came to India in April, 1983 and in May she filed petition before the learned

Judicial Magistrate, First Class, Jagraon for the custody of her son contending that he was in the illegal custody of the husband. The Apex Court has also observed that, from the records it was disclosed that the father was a man without a character who had planned to kill wife and even though the wife had obtained an order of probation for him, he abused her magnanimity by running away with the boy soon after the probation period was over. In fact, the husband was trapped by the Police who got the scent that he was negotiating with a hitman to have his wife run over by a car. The husband was convicted and sentenced to term for three years for that offence. Ironically, it was the wife who intervened and succeeded in obtaining a probation order for her husband who had attempted to procure her murder. In those circumstances, the directions were issued for delivery of custody of the child to the mother.

6. In **Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and another,** reported in AIR 1987 SC 3, it was a case wherein on 23-12-1980, the petitioner along with her son took up separate residence in a women's shelter and filed a petition for divorce in January, 1981. By decree dated 23-4-1982, the marriage was declared dissolved and the petitioner was held to be entitled for custody and control of the minor child until she reaches the age of 18

years or until further order by the Court, while giving visitation right to the father. Taking advantage of the visitation right, the father picked up the child from the school on 10-1-1986 and surreptitiously left the United States of America for India on 11-1-1986, without intimating the Court about the taking away of the child out of its jurisdiction and out of the country, nor giving slightest indication to the petitioner about his intention to leave the United States permanently for India. The mother filed writ petition for habeas corpus for production of the child. In response to the notice of the Court, only explanation which the father had was that, his father was seriously ill and he wanted his father to see the child and further that the child himself had expressed willingness to prefer to stay with him in Pune and that therefore he was admitted to a school at Pune. After considering the materials on record, the Apex Court held that the mother is full of genuine love and affection for the child and she can be safely trusted to look after him, educate him and attend in every possible way to his proper up-bringing and the child had not taken root in this country and he was still accustomed and acclimatized to the conditions and environments prevailing in the place of his origin in the United States of America and the child's presence in India was the result of an illegal act of abduction by the father who cannot claim any advantage by stating that he has already put the child in

some school at Pune.

7. In **Mrs. Kuldeep Sidhu v. Chanan Singh and others,** reported in AIR 1989 Punjab and Haryana 103, the High Court of Punjab and Haryana was dealing with a case wherein after the marriage between the parties in the year 1975 they were living in Canada and they got two issues, namely, Navreet and Preeti in 1978 and 1981 respectively. Navreet was brought by his father in India in 1984 and was left with his grandfather in Punjab and the father of Navreet left India for Canada. About a year-and-half thereafter, he also brought his daughter to India and left her with his father. Towards the end of 1986 he came to India and took away both the children to Canada. Meanwhile, the relationship between the husband and the wife were strained and they were living apart. On 21-11-1986 the mother obtained an order from the Supreme Court of Ontario granting her interim custody of the children and by that order the father was restrained from removing the children from the Province of Ontario. On getting to know of the said order, the husband left Canada on the very day with the children and brought them to his father's place in Punjab. Observing that there is an order of the competent Court granting custody of the children to the mother and restraining the father from taking them out of the

jurisdiction of the Court, and yet the children, in violation of the said order were brought in India and were not allowed to be in the custody of their mother, therefore, in those circumstances, the mother was held entitled for the custody of the children.

8. In **Miss Atya Shamim v. Deputy Commissioner/Collector, Delhi (prescribed Authority under Citizenship Act) and others,** reported in AIR 1999 Jammu & Kashmir 140, after taking into consideration various decisions on the point of maintainability of habeas corpus petition for the custody of a child, it was held that in any proceeding before any Court concerning the custody or upbringing of an infant, the Court must have regard to the welfare of the infant as the first and paramount consideration and must treat any rights, priorities or preferences of the parents or of either of them or of other person as subordinate thereto; that comfort, health and the moral intellectual and spiritual welfare of the infant are the true matters for consideration in such cases and not rights of the parties. It was held that the true principle deducible from the authorities by which the Court should be guided in such cases, was that the Court is to judge upon the circumstances of each particular case and that the welfare of the infant, irrespective of its age is the main factor to be regarded. On the point of custody of the

child, it was also observed that the personal law of the parties permit the mother to keep the custody of the female child till the age of 15 years and that there was no case made out for entrusting the custody of the minor to the father.

9. In **Dhanwanti Joshi v. Madhav Unde,** reported in (1998) 1 SCC 112, the respondent Unde had married the appellant Dhanwanti and after marriage left for the United States of America where he obtained an ex parte divorce against his first wife Bhagyawanti. The said Bhagyawanti filed a petition in the District Court at Nagpur claiming that the decree obtained by Unde to have been obtained on misrepresentation of the facts and claimed for divorce and maintenance and succeeded in getting a favourable decree. Dhanwanti meanwhile delivered a child in the United States of America on 15-3-1983 and due to certain compelling circumstances, she left the respondent Unde along with her child on 20-4-1983 and thereafter the husband had no occasion to live with his wife and the child. It was followed by litigation, civil and criminal, both in the United States of America and India for over a period of 14 years. The respondent Unde continued to live in the United States while the appellant Dhanwanti and her son had been living in India while the boy was studying at Pune. The respondent filed a divorce

case in the United States of America against Dhanwanti and also asked for custody of the child. Initially, the U.S. Courts gave custody of the child to the mother Dhanwanti. Divorce was decreed on 23-9-1983. On 20-2-1984 Dhanwanti along with the child came to India. The husband obtained an ex parte order on 11-4-1984 for visitation rights, which was further modified as temporary custody on 30-4-1984, which was made a permanent custody by ex parte order dated 28-4-1986. Dhanwanti filed petition in the Civil Court at Bombay for declaration that her marriage with the respondent was null and void on account of prior subsisting marriage with Bhagyawanti. Meanwhile, the respondent-husband filed a habeas corpus petition in this High Court which came to be dismissed on 15-4-1986. The litigation in the Family Court continued and ultimately it passed order allowing the father to take custody of the child while dismissing the petition filed by Dhanwanti. The appeal carried to the High Court failed and that is how the matter was brought before the Apex Court. Taking note of the fact that the Family Court and the High Court had based their decisions solely on the circumstances regarding the financial capacity of the father to give better education to the boy in the United States of America and after interviewing the boy, the Apex Court found that he was quite intelligent and was able to understand the facts and circumstances in which he was placed and he informed

the Hon'ble Judges of the Apex Court who had interviewed him that he was not inclined to go with his father to the United States and wanted to complete his study in India till he completes 10+2 or he finishes his graduation. The Apex Court held that the orders passed by the High Court and the Family Court to be erroneous and the custody of the child was retained with his mother.

10. In **Paul Mohinder Gahun v. State of NCT of Delhi & Ors.,** reported in 2005 (1) HLR 428, while holding that a girl child of tender age is bound to shape better in the care of her mother, especially when it is not the case of the petitioner that the environment in which the respondent is living in India is not conducive for the upbringing or that the child will not have proper schooling necessary for any career that she may choose for herself and even though the father is financially better off than the mother with whom the child is presently living but then the superior financial position of the husband is no ground for change of the custody. It was also observed that the prospects of immediate Canadian education which the father may be ready to provide also cannot be a sufficient ground for shifting the custody of the child to the father ignoring the fact that the child had never stayed away from her mother and is in her custody. The fact that the child is a Canadian

citizen by birth is also hardly of significance at this stage.

11. In **Eugenia Archetti Abdullah v. State of Kerala,** reported in 2005 (1) HLR 34, it was held that writ of habeas corpus will be issued only when there is illegal detention or wrongful custody. It was a case of a child of three years held to be in illegal custody of the father.

12. In **Dr. Mrs. Veena Kapoor v. Varinder Kumar Kapoor,** reported in AIR 1982 SC 792, it was held that in a habeas corpus petition it is difficult to take evidence without which the question as to what is in the interest of the child cannot satisfactorily be decided.

13. In **Poonam Datta v. Krishanlal Datta and others,** reported in AIR 1989 SC 401, the Court ordered for continuation of workable arrangement till either of the parties go for appropriate guardianship proceedings and gets a declaration. Therein, upon the orders of the Court, the husband had shifted over to Modi Nagar and was prepared to stay at Modi Nagar in view of the fact that the boy was admitted to the local school at Modi Nagar where the mother was a teacher. In those circumstances, the Apex Court directed that the boy should continue to study in the said school and neither party

would be permitted to withdraw him therefrom without permission of the Court.

14. In **Smt. Manju Tiwari v. Dr. Rajendra Tiwari and another,** reported in AIR 1990 SC 1156, it was an order passed on satisfaction of the Apex Court having arrived in the peculiar facts and circumstances of the case and taking into consideration the past history, which is not narrated in the order.

15. In **Kumar V. Jahgirdar v. Chethana Ramatheertha,** reported in 2004 (1) HLR 468, the Apex Court held that, in the facts and circumstances revealed therein, the judgment of the High Court giving exclusive custody of the child to the mother with visitation rights to the natural father, could not be found fault with except directing certain modifications for the reasons which were enumerated in the said judgment. One of the reasons disclosed for giving the custody of the child was that the father of the child was living alone with his father and there was no female member living in the house and the father was carrying on business which required him to attend to his office and business engagements outside his residence.

16. In **Smt. Radha @ Parimala v. N. Rangappa,** reported in 2004 (2) HLR 416, it was held by the Karnataka High Court that the question as to where the welfare of the minor lies should be answered after weighing and balancing all factors germane to the decision-making, such as relationships, claims and wishes of parents, risks, choices and all other relevant circumstances and the answer lies in the balancing of these factors and circumstances and determining what is best for the minor's total well-being.

17. All the decisions relied upon lay down the law that the petition for writ of habeas corpus would lie only in cases of illegal or wrongful detention or custody. Undoubtedly, it would also lie in the case of demand for custody of child provided it is illegally and unlawfully denied to the parents or any one of them.

18. The pleadings and the materials placed on record prima facie disclose that since November, 2002 Ella has been residing at Anjuna along with the respondent without any sort of difficulty and with all the facilities to the petitioner not only to visit Ella but even being allowed to take the child for dinner or for shopping. It was only in the year 2004 the petitioner thought of taking Ella to Ireland for education. Apart from mere allegation that proper education will

be available at Ireland as compared to the one which is being imparted at Goa, no factual data in that regard is placed on record. The materials do not disclose any obstruction to the petitioner from visiting Ella or even taking her for few days or during holidays at the place of residence of the petitioner in Goa. The question of permitting Ella to be taken to Ireland, without adjudicating upon the rival contentions sought to be raised in the matter which essentially would require analysis of the disputed questions of fact, would not be possible in exercise of writ jurisdiction.

19. Perusal of the facts narrated in the petition coupled with the statements of facts brought on record in-reply and revealed from the documentary evidence on record, it is prima facie clear that there is nothing to suggest that the child Ella is residing with her father on account of some forcible act on the part of the respondent or that it was even without the consent or knowledge of the petitioner. Even Ella's joining of school in Goa prima facie appears to be with the knowledge and tacit consent of the petitioner. Prima facie it appears that certain circumstances which created rift between the spouses have led for the controversy in the matter and it being used not in the interest of the child but rather ignoring her best interest. Taking into consideration various facts brought on record and as they stand

today, it would be difficult to accept the contention of the petitioner that there is a case for disturbing the residence of the child with the respondent. Besides, the educational year is also from June to April of the succeeding year. We are already in the month of March. At this stage, any change in the residential place of the child would also disturb the educational process for the child. Taking into consideration the decision of the Apex Court in **Dr. Mrs. Veena Kapoor's** case (supra) and further that the matter involves disputed questions of fact which are required to be established by evidence, it would be in the interest of the child to relegate the parties to normal civil proceedings for the decision on the point of custody of the child, without disturbing the prevailing situation.

20. We had interviewed the child in the chamber, firstly in the presence of her parents and their Advocates and thereafter in their absence. The child appears healthy and she seems to be happy to continue to reside with her father and she enjoys all the necessary amenities, care and protection from her father and at the same time she has lot of respect and love for both the parents. It is also revealed from the interview that the mother i.e., the petitioner has been occasionally visiting the child at her residence at Anjuna.

21. In the facts and circumstances of the case, there being no satisfactory material placed before us to arrive at the conclusion of illegal detention or unlawful custody of the child by the respondent in respect of Ella and there being no sufficient material placed before us to justify disturbance of the status quo, bearing in mind the best interest of the child, it would be appropriate not to disturb the present situation in relation to the minor child and, therefore, in our considered opinion, leaving the parties to pursue civil remedy if they so desire, the petition deserves to be dismissed and is accordingly dismissed, with no order as to costs.

(N.A. Britto, J.) (R.M.S. Khandeparkar, J.)

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